SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 552

KENNETH E. GRIGSBY, F. W. MARTINIK, F. J. FINLEY, L. W. BLANABARD, JAMES PITTY, MARVIN FOSTER, FRED POJE, K. CONNER, ALVIS RANDOLPH, FLOSSIE MARTIN, B. E. GREENWOOD, NEAL SCOTT, HENRY F. DOYLE, ALBERT POJE, E. S. FABAC, PAUL PAINE, ELWOOD PHILLIPS, S. E. PHILLIPS, D. C. RICHARDS, ED. HAMEL, FRANK E. PRINGLE, and JAMES B. VAN FLEET, JR., *Petitioners*

v.

PAUL F. MITCHUM, Mayor of the City of Kansas City, Kansas; EARL B. SWARNER, Health and Finance Commissioner of the City of Kansas City, Kansas; JOSEPH P. REGAN, Street Commissioner of the City of Kansas City, Kansas; JOHN THEROFF, Chief of Police of the City of Kansas City, Kansas; and JOHN O. SLAUGHTER, Chief, License Department of the City of Kansas City, Kansas, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT.

PEYTON FORD
1000 Connecticut Avenue
Washington 6, D. C.

ROB COOK
645 Ann Street
Kansas City, Kansas

Attorneys for Petitioners

Of Counsel:

GLENN R. GRAVES
1000 Connecticut Avenue
Washington 6, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Kansas Supreme Court entered in the above-entitled case on April 6, 1963.

CITATION TO OPINION BELOW

The Opinion of the Kansas Supreme Court appears at 191 Kan. 293 (advance sheets) and is reproduced herein as Appendix D.

JURISDICTION

The judgment of the Kansas Supreme Court was entered on April 6, 1963. Rehearing was denied on May 17, 1963. Mr. Justice Goldberg entered orders on August 15, 1963 and September 10, 1963 granting petitioners' motions for extension of time within which to file a petition for certiorari to September 15, 1963 and to October 14, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where it is possible that an operator of pinball machines who has paid the $250 Federal stamp tax imposed by 26 U.S.C. § 4461(a)(2) has nevertheless *not* violated the Kansas anti-gambling law, does a Kansas municipal ordinance, aimed at suppression of gambling, violate due process requirements by depriving the operator of a license to operate pinball machines solely because of his payment of the Federal tax, without according him a procedural opportunity to prove that he has not in fact violated the Kansas anti-gambling law?

2. Does a Kansas municipal ordinance violate the due process or equal protection clause of the Fourteenth Amendment by providing that, solely because they have paid the $250 Federal stamp tax, pinball machine operators lose their rights to operate pinball machines, although (a) neither the machines nor their use violate applicable Kansas anti-gambling laws and

(b) the ordinance does not deny a license to operators who, though obligated to pay the Federal tax, have not done so?

3. Does a municipal ordinance violate the due process clause of the Fourteenth Amendment by declaring that whether an applicant may receive a license to operate pinball machines depends upon whether the City Police Chief determines that the applicant possesses "good moral character," if neither the ordinance nor any other legislation sets any criteria or standards of "good moral character?"

STATUTE INVOLVED

The statute involved in this case is an ordinance promulgated by the City of Kansas City, Kansas on November 16, 1961, known as Ordinance No. 43040. It is reproduced herein as Appendix C.

STATEMENT

A. The Legal Background

Kansas State law forbids "gambling". A criminal statute outlaws the keeping in public or private places of any "slot machine or gambling device, devised and designed for the purpose of playing any game of chance for money or property. . . ." G. S. 1949, 21-1508 (App. A)

However, in the leading case of *State* v. *Waite*, 156 Kan. 143, 131 P. 2d 708, the Kansas Supreme Court held that the ordinary "pin-ball" machine which pays off high scores with free games is not such a "slot machine" or "gambling device" as is outlawed by G. S. 1949, 21-1508. The Court reaffirmed this view in *State* v. *One Bally Coney Island No. 2101f Gaming*

Table, 174 Kan. 757, 258 P. 2d 225, holding another "pin-ball" machine not subject to seizure and destruction under the act.

Federal law requires payment of a $250 stamp tax on ". . . so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens." Int. Rev. Code, 26 U.S.C. § 4461(a)(2) and § 4462(a)(2)

A regulation promulgated by the Treasury Department pursuant to 26 U.S.C. § 4462(a)(2) provides that pinball machines may be taxable under 26 U.S.C. §§ 4461(a)(2) and 4462(a)(2) even though no payoffs are made in connection with their operation nor any reward other than the ordinary free games is received. Treas. Reg. 45.4462-1(b) (App. B) The validity of the Treasury regulation's extension to pinball machines of the $250 stamp tax imposed by 26 U.S.C. § 4461(a)(2) upon "slot machines," does not appear to present any legal question. See *United States* v. *Korpan*, 354 U.S. 271 (1957).

Against this legal background, the city of Kansas City in 1961 enacted an ordinance, No. 43040, imposing a license requirement for the privilege of operating any coin-operated amusement device, including pinball machines. Such a license, the ordinance declared, must be refused to any applicant who has paid the $250 stamp tax required by Federal law under 26 U.S.C. § 4461(a)(2) (and withdrawn from any such person to whom it was issued before discovery of his payment of the Federal tax). After ordaining that any person, firm or corporation keep-

ing for operation any coin-operated amusement device, including pinball machines, must secure a City license, the ordinance specifies in Section 2 that all applications for licenses must be made on a standard form including certain enumerated information. In relevant part it states:

> "(d) Whether applicant or owner has paid a current $250.00 federal occupational tax for the use or permit to use on any place or premises in Kansas City, Kansas, a coin-operated amusement or gaming device under the Federal Internal Revenue Code (Title 26) Paragraph (2), of Section 4461(a) of the United States Code Annotated. No license shall be issued to any applicant, and the license if issued shall be revoked, whenever the applicant or owner has paid a $250.00 current federal occupational tax for the use or permit to use on the place or premises where the machine or device is to be displayed, a coin-operated amusement or gaming device under the Federal Internal Revenue Code (Title 26), Paragraph (2) of Section 4461(a) of the United States Code Annotated."

B. The Present Case

Twenty-five operators of small Kansas City businesses filed a complaint in the District Court of Wyandotte County, seeking a judgment declaring the ordinance unconstitutional and an injunction against its enforcement. In their complaint the plaintiffs alleged that they all operated small businesses within Kansas City, that most contained coin-operated pinball machines on the premises for the purpose of producing supplemental income and that the machines were used solely for amusement purposes. They further alleged that most of their number had purchased $250 Federal Tax stamps when informed by Federal agents that all

such coin-operated devices were subject to the tax, regardless of whether there was gambling on the devices. The basis of these alleged statements by the agents was Treasury regulation 45.4462-1(b) (App. B)

In their pleadings the plaintiffs advanced two distinct theories of unconstitutionality. One was that Section 2(d) of the ordinance, which would effectively deprive them of the right to operate pinball machines for amusement purposes and incidental income to themselves, constituted a deprivation of their constitutional rights under the Fourteenth Amendment. A second was that Section 3(c) of the ordinance, requiring approval by the Chief of Police and Electrical Inspector as a prerequisite for a license, was an illegal delegation of legislative power.

After answering pleadings, the matter was submitted to the Court without the introduction of any evidence. After hearing arguments, the Court declared the ordinance unconstitutional, affirming both of plaintiffs' arguments above and enjoining the implementation of the ordinance. (R. 25).

On appeal by City officials, the Kansas Supreme Court reversed the county court decision. While conceding the principles enunciated in *Waite* and *Coney Island* cases, and without contesting that the plaintiffs below had operated the pinball machines in question solely for amusement purposes, the Court nevertheless concluded that the ordinance was not unreasonable or arbitrary, hence did not violate standards of due process. The Court bottomed its rationale not upon the view that the pinball machines were gambling devices within the purview of state law, but upon the premise that payment of a $250 Federal stamp ". . . raises a strong presumption of illegal activity." (App.

D. 18a) Such a presumption, reasoned the Court, in and of itself justifies the prohibitions of the ordinance, so far as due process is concerned. The Court rejected the argument based on delegation of legislative authority by construing the ordinance to limit the functions of the inspecting officers "to the duties specifically stated," and holding that "if the applicant and his premises meet the standards required by the ordinance, these officers are obligated to approve the application." (App. D. 20a)

It is this decision that petitioners seek to have reviewed by their petition for certiorari.

REASONS FOR GRANTING THE WRIT

1. This case presents the unusual situation of a Municipality seeking to employ a Federal statute and regulation for the purpose of achieving indirectly a certain social objective which the Municipality either cannot or has not elected to achieve directly. The technique of indirection employed by Kansas City can be easily emulated by other cities. The case is one of first impression and its disposition here will probably be closely observed by City Governments throughout the United States. If the instant case is not considered on its merits by this Court the "indirect enforcement" technique which petitioners consider violative of the Fourteenth Amendment may well be broadcast across the country. The present case is unquestionably the appropriate vehicle for a definitive resolution of the serious Constitutional questions posed by this technique.

2. It is inherently difficult to square the Kansas City ordinance with the Fourteenth Amendment. So far as the instant litigation is concerned the precise difficulty centers not so much upon the social end sought

to be achieved but upon the means by which the ordinance accomplishes its objective. The Kansas Supreme Court was evidently aware of this difficulty but did not fairly answer it.

The Kansas Supreme Court justifies the Kansas City ordinance, from a due process standpoint, by interpreting it as an act designed to inhibit "gambling" activities illegal under Kansas law. Such a social objective, as the Kansas Supreme Court repeatedly observes, falls well within the purview of the general police power enjoyed by the states. Granted that such an overall objective comports with due process requirements, the Kansas Supreme Court has nevertheless failed to rationalize the peculiar operational defects of the ordinance. The Kansas Supreme Court concedes that payment of the $250 Federal Stamp Tax does not in itself denote an operation in violation of the Kansas anti-gambling law. It therefore does not deny that the Kansas City ordinance may have the effect (and petitioners contend that in the instant case *has* had the effect) of denying operator's licenses to individuals whose pinball machines and their operation are perfectly legal. While the objective in the abstract is indeed justifiable, the means chosen to achieve the objective cannot be justified by any reason and are violative of fundamental fairness.

The court justifies the means not on the ground that payment of the $250 Federal Stamp Tax implies that the operator in question is, or has been, in violation of State law, but rather on the somewhat nebulous ground that such payment raises a logical "presumption" of illegal activity. What the Court in effect says is that there is some rational connection between payment of the tax and a *suspicion* of gambling activity, illegal

under State law. In so saying, it appears that the Kansas Court has confused such a "rational" suspicion with the more familiar imperative of due process, namely, the requirement of some reasonable or rational connection between the end of legislation and the means employed by the legislation. It may be assumed *arguendo* that payment of the $250 Federal tax affords some common sense grounds for suspicion or question as to whether an operator maintains illegal "gambling" devices. Almost certainly, the mere fact of such payment could not constitute probable cause for arrest of such an operator by State law enforcement authorities. The strength of the suspicion is of a lesser order, perhaps such as might reasonably lead a law enforcement official to investigate the operator's activities. Though far from compelling, the suspicion generated by the fact of payment is not wholly irrational. On the other hand, there is no reasonable connection between the methods employed by the ordinance and the "object sought to be attained" by it, see *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934).

If the object is to inhibit gambling activities, the operational methods of the ordinance are unreasonable in that they not only permit but *require* both gambling and non-gambling activities to be destroyed. To paint with such a broad brush in itself raises substantial due process questions. But this ordinance goes further. Not only does it condemn the just and the unjust alike, but it actually deprives all operators of any procedural opportunity to disprove the "presumption" of illegal activities which, according to the Kansas Supreme Court, arises from the fact of their payment of the Federal tax. Even if the "presumption" is fairly

drawn, it is eminently unfair not to allow an operator some reasonable opportunity to prove that he is not in violation of state anti-gambling laws. Instead, he is stripped of his property interest by legislative fiat. The notion of due process originally denoted procedural fair play, see *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1856), and this is its most exalted significance today, E.g., *Morgan* v. *U. S.*, 304 U.S. 1, 18-19 (1938); *Twining* v. *New Jersey*, 211 U.S. 78, 110-111 (1908). In cutting off an operator's chance to exculpate himself, the ordinance obliterates the most basic tenet of procedural fair play, and perpetuates a system whereby both lawful and unlawful pinball operations are closed by the City. Such an approach to regulation of business operations cannot be squared with the dictates of due process.

3. Another Constitutional infirmity of the legislative method here questioned can best be stated in terms of the results of this very case. The petitioners all operate ordinary pinball machines. It is conceded that the machines themselves are not illegal under Kansas law. It is likewise agreed on the record of this case that they are in fact operated for amusement purposes only. In other words, both the machines as such, and the uses to which they are put by the petitioners, are perfectly lawful under general Kansas law. The ordinance does not purport to alter the legal character of the pinball machines or their use by the petitioners. It does, however, destroy the petitioners' right to continue their lawful operation of pinball machines because, having paid the $250 Federal stamp tax as demanded by Federal agents, these petitioners

no longer qualify for the license dictated by the ordinance.

It is not questioned, of course, that the $250 Federal tax is imposed by Treasury regulation 45.4462 1(b) upon pinball machines which are not "gambling" devices in the ordinary sense of the word and, as here, do not run afoul of state anti-gambling laws. The ordinance makes ineligible for a license any business proprietor who has paid such a Federal tax, regardless of whether the machines upon which it was paid, or their uses, violate state law. But the ordinance does *not* make ineligible the proprietor who is obligated under Federal law to pay the $250 tax and has failed to do so. The result of this technique of indirection is an uneven and unfair regulation of property rights. The proprietor who flouts Federal law is not disabled by this ordinance whereas the proprietor who obeys Federal law is driven out of the pinball machine business by it. This is invidious discrimination of an extreme character. Under either the equal protection or due process clauses, petitioners contend that this ordinance should not be allowed to stand. That its force falls unevenly upon the proprietors who obey Federal law and those who do not amounts to an unreasonable and unjust discrimination between the two classes, thus contravening the equal protection clause. See, *e.g.*, *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). This discrimination may itself be of such an injurious character as to bring into operation the due process clause. Cf. *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939). In any event, that clause is manifestly pertinent because the relation between the

means and end of the ordinance is unreasonable, arbitrary and capricious.

4. There is an entirely separate due process question of considerable gravity which was not answered by the Kansas Supreme Court. The latter tribunal was apparently of the view that Section 3(c) of the ordinance created merely ministerial rather than discretionary powers in the Chief of Police. The Court explained that "reasonably construed, the ordinance limits the functions of these officers to the duties specifically stated, and if the applicant and his premises meet the standards required by the ordinance, these officers are obligated to approve the application." Perhaps because it was preoccupied with the issue as to delegation of legislative power, the Court overlooked entirely the more serious question of whether there are any standards or guidelines for the performance of the official duties.

The Chief of Police, according to Section 3(a) of the ordinance "shall investigate the location where it is proposed to operate such machine, ascertain if the applicant is a person of good moral character, and either approve or disapprove the application." The ordinance fails to specify *any* applicable standards for determining whether an applicant is a person of "good moral character." The phrase "good moral character," while not unknown among state and Federal statutes, is amorphous in content. Precisely because it lends itself to countless interpretations the phrase should be defined with precision. Passing the question of delegation of authority, petitioners contend that to permit the Chief of Police to decide whether an applicant may receive a license violates due process when his personal and private assessment

of "good moral character" is aided by no legislative standards or guidelines whatever. His discretion is thus allowed to run rampant, inviting numerous deleterious consequences. Among the harmful effects foreseeable is that his judgment will vary from applicant to applicant and that his freedom from any legal standards at all will tempt applicants into questionable or even illegal methods of prevailing upon him to grant their particular applications.

This question in its own right merits review and plenary consideration by this Court, since the official judgment of "good moral character" as contemplated by this ordinance is a device that may well be employed by many other unrelated ordinances in cities of this country. The constitutionality of the device should be decided before the device becomes more pervasive.

CONCLUSION

WHEREFORE, Petitioners pray that a Petition for Certiorari be granted.

PEYTON FORD
1000 Connecticut Avenue
Washington 6, D. C.

ROY COOK
645 Ann Street
Kansas City, Kansas

Attorneys for Petitioners.

Of Counsel:

GLENN R. GRAVES
1000 Connecticut Avenue
Washington 6, D. C.